

Bleecker St. Tenants Corp. v Bleecker Jones LLC
2008 NY Slip Op 32263(U)
August 4, 2008
Supreme Court, New York County
Docket Number: 0600053/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDNEAD
Justice

PART 35

Bleecker Street

INDEX NO. 600053/08

MOTION DATE 6/24/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Bleecker Jones et al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED
FILED
AUG 06 2008

COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on its complaint is denied; and it is further

ORDERED defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 8/4/08

HON. CAROL EDNEAD
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
BLEECKER STREET TENANTS CORP.,

Plaintiff,

Index No. 600053-2008

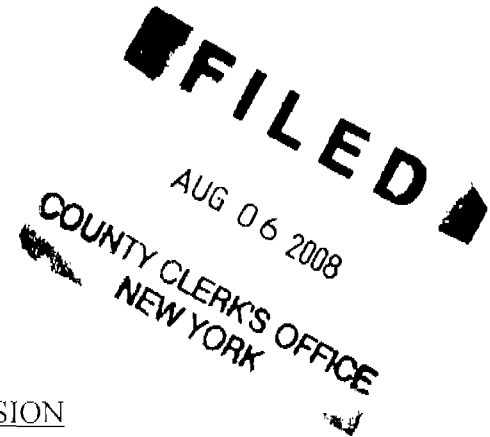
-against-

Motion Sequence 002

BLEECKER JONES LLC, BLEECKER JONES
LEASING COMPANY, a/k/a BLEECKER JONES
LEASING COMPANY, BUFFINGTON LTD. d/b/a
CAFÉ VIVALDI, DAN YANG ZHAO d/b/a
EASYWAY COMMUNICATIONS TECHNOLOGY
INC., DAN YANG ZHAO d/b/a INTERNET CYBER
CAFÉ and all other fictitious names unknown at this
time JANE DOE and JOHN DOE,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.



MEMORANDUM DECISION

This is an action to declare certain renewal options in a commercial lease void under the Rule Against Perpetuities, as codified in Estates Powers and Trusts Law (“EPTL”), and under New York’s common law restraint against alienation.

Defendants, Blecker Jones LLC and Bleecker Jones Leasing Company, a/k/a Bleecker Jones Leasing Company (“defendants”) seek an order granting summary judgment dismissing the complaint pursuant to CPLR 3212 and dismissing the complaint as untimely under the applicable six-year statute of limitations.

Background

Plaintiff, Bleecker Street Tenants Corp. (“plaintiff”) was formed in connection with the conversion of the premises located at 277-279 Bleecker Street, New York, New York (the “Building”) to cooperative ownership. In 1983, plaintiff, as lessor, and Bleecker Jones Leasing

Company ("Bleecker Leasing" or "tenant") as lessee, entered into a lease (the "Lease") concerning the entire commercial space located in the Building (the "Premises").

Section 1.12 of the Lease provided for an initial term of 14 years commencing on the first day after plaintiff took title to the Building and ending at midnight on the day before the 14th anniversary of the commencement date.

At issue is Section 1.3 of the Lease (the "Option Clause"), which contains an option to renew the Lease ("Renewal Options") as follows:

Lessee is hereby granted nine (9) consecutive options to renew and extend the term of this lease as the same may be modified or amended. Each renewal option term shall be for a period of ten (10) years and each renewal option term shall commence on the first day of the calendar month immediately following the expiration of the immediate preceding term of this lease. Each said renewal options [sic] may be exercised together or successively and each shall be exercised by written notice to Lessor given at least six (6) calendar months ["6-months' notice"] prior to the expiration date of each immediately preceding term of this lease; provided, further, that in the event any option is not exercised that option and the succeeding options shall expire and no longer be available to Lessee.

* * * * *

Notwithstanding the foregoing, in the event Lessee has not heretofore timely exercised any renewal option and provided Lessor has not notified Lessee of the existence of such option within seven (7) calendar months prior to the date of which each term ends [the "7-months' notice"], then *each such renewal option shall continue to remain in effect and Lessee may exercise such renewal option within sixty (60) days after Lessor notified Lessee in writing of its right to exercise each such option, notwithstanding the fact that the term of said lease may have expired. If the term shall have expired, Lessee shall remain in possession as a month-to-month tenant until Lessor shall have complied with the foregoing.* (Emphasis added).

Complaint

Plaintiff alleges that Bleecker Leasing, as drafter, added the Option Clause in an attempt to remain as lessee in perpetuity. The result of the Option Clause is that the Renewal Options

would vest after the Lease expired, therefore creating the possibility that the Renewal Options would not vest within the permissible period set forth in EPTL § 9-1.1, which codifies the Rule Against Perpetuities.

In its first cause of action, plaintiff alleges that if the defendants never exercise the Renewal Options, and plaintiff never notifies defendants in writing of their right to do so, the Renewal Options will remain in effect beyond both (1) the applicable perpetuities period and (2) the expiration or termination of the Lease, effectively suspending the power of alienation forever. Such open ended Renewal Options offend the notion of free alienation of property, and should be declared void under the Rule Against Perpetuities pursuant to EPTL § 9-1.1(a)

In its second cause of action, plaintiff alleges that the Renewal Options, which may possibly vest after the expiration of the 21-year perpetuities period, also violate EPTL § 9-1.1(b), and must be held void as against public policy unless they are either appurtenant or appendant to the Lease. The Renewal Options were explicitly drafted in a manner which would enable defendants to exercise its Renewal Option(s) after the Lease expired. The Renewal Options remain effective after the expiration of the Lease, while defendants remain as month-to-month tenants, unless and until plaintiff provides defendants with notice. Since defendants retain the indefinite right to elect said options, notwithstanding the fact that the Lease itself has terminated, the Renewal Options are not appurtenant to the Lease and should be declared void pursuant to EPTL § 9-1.1(b).

Plaintiff's third cause of action alleges that since the Lease provides for a potentially indefinite possession of the premises by defendants, the Court should declare the Renewal Options void under the common law rule against unreasonable restraints on alienation.

And, the fourth cause of action seeks a declaration that Blecker Jones LLC,¹ Blecker Leasing, and their subtenants, defendants Buffington Ltd. d/b/a Café Vivaldi, Dan Yang Zhao d/b/a Easyway Communications Technology Inc., Dan Yang Zhao d/b/a Internet Cyber Café (collectively, “sub-tenants”) are month-to-month tenants.

Defendants’ Motion

Defendants argue that the Option Clause was inserted to ensure that the Lease would remain in effect notwithstanding the parties’ failure to serve counter notices on each other.

Pursuant to the Option Clause, should plaintiff fail to serve the 7-months notice, and defendants not independently serve their 6-month notice, then, the impending expiration of the Lease term is to be disregarded and the Lease becomes one of month-to-month. The month-to-month term would continue until such time as plaintiff serves a written notice on defendants providing 60 days within which to exercise their Renewal Options. EPTL § 9-1.1 is not implicated because the Lease term is extended under the Lease on a month-to-month basis until the expiration of the 60-Day Notice’s sixty-day period. Thus, plaintiff’s allegation that the plaintiff might not issue the 60-Day Notice until more than 21 years have passed since “termination of the ‘Lease’” is erroneous; the Lease, by design, does not, and cannot expire until after issuance of the 60-Day Notice. If the term of the Lease expires, the defendants become month-to-month tenants until either party terminates it or defendants exercise their renewal right. Defendants must exercise each option prior to the expiration of the Lease. Since the Lease does not terminate, the Renewal Options remain continually vested and EPTL § 9-1.1 is never

¹ According to the Complaint, the members of Blecker Jones LLC are identical to the partners of Blecker Leasing, and that Blecker Jones LLC was intended only to be a change in the form of entity of Blecker Leasing, with no change in its beneficial ownership (Complaint ¶ 6).

implicated.

Furthermore, with the Renewal Options contained within the Lease, they are appurtenant to the Lease, and therefore, not contemplated by EPTL § 9-1.1(b). Since the Lease term does not expire, and the option is appurtenant to the Lease itself, there can be no remote vesting and the Rule Against Perpetuities is respected.

Moreover, even if the Lease were not express in establishing that it remained in force as a month-to-month lease, the terms of the Lease would still apply. Because the leasehold terms remain extant under the Lease and there is no gap during which defendants have not vested tenancy, the Renewal Options, appurtenant to the Lease, never lapse and do not violate EPTL § 9.1.1.

Similarly, the Renewal Options do not violate the common law restraint against alienation, the purpose of which is to encourage the productive use of property by providing a definite person or party with vested title. The Lease herein serves to ensure the productive use and development of property by its current beneficial owners by providing defendants with assurances that its prolonged tenancy, by way of repeated renewals, will be respected. Once so ensured, tenants, such as defendants, are encouraged to invest and develop their premises to the highest and best uses.

Finally, since the Lease was executed in 1983, the six-year statute of limitations governing declaratory judgment actions expired on September 1, 1989, rendering the instant action untimely. Even if the Court were to conclude that the cause of action accrued at the time of the first renewal period in 1997, the statute of limitations would have expired in 2003, rendering the instant action yet untimely.

And, as there are no issues of material fact, summary judgment should be granted defendants.

Plaintiff's Cross-Motion

Plaintiff opposes defendants' motion and cross moves for summary judgment.

The Lease does not obligate plaintiff to provide two notices to defendants or to issue a 60-Day notice. The language that violates the Rule Against Perpetuities is clear: in the event the tenant does not exercise any of the Renewal Options in a timely manner, and provided that the plaintiff has not notified the tenant of the existence of the Renewal Options within seven calendar months prior to the date of which the Lease term ends, the Lease expires and the Renewal Options, not the Lease, continue to remain in effect, with absolutely no outside time limitation prescribed. The tenant may exercise such Renewal Options within 60 days after plaintiff notifies defendants of the right to exercise such option, notwithstanding the fact that the term of the Lease may have expired. Thus, after the Lease term expires, the tenant can remain in possession as a month-to-month tenant in perpetuity.

The Option Clause does not ensure that the Lease will remain in effect in the event that notice is not sent by defendants that they are exercising their option rights; rather, it only extends the Renewal Options, thereby giving defendants the right to elect its option, for an indefinite and unmeasured period of time, notwithstanding the fact that the term of said Lease may have expired. Although the Renewal Options originate within the Lease, it is irrefutably capable of being exercised after the Lease expires, and is capable of being separated from the Lease. Therefore, the Renewal Options are not appurtenant to the Lease. Defendants' assertion that the Lease term's expiration is to be disregarded must fail. The Lease term is limited to a specific

period of years, and when the Lease expires, the tenant becomes a month-to-month tenant. The month-to-month tenancy is a new term, for a new period, separate and distinct from that which preceded, each related to the other only in the conditions of the original Lease. The month-to-month tenancy does not serve to extend or prolong the initial Lease term itself.

Further, the presumption found in EPTL § 9-1.3 that “the creator intended the estate to be valid” such that the parties expected the Renewal Options to be exercised within the 21-year period does not arise, since the parties have manifested a contrary expectation that the contingency might occur, and the Renewal Options might be exercised, well beyond said time frame. Such presumption does not authorize the courts to rewrite instruments that unequivocally allow interests to vest outside the perpetuities period. An option containing no limitation, as the one herein, demonstrates the parties’ intent that it last indefinitely and EPTL § 9-1.3 does not permit a rewriting of the option so as to make it conform to the permissible period. Here, the Renewal Options never “die[]”; they literally remain viable forever, enabling defendants to remain as month-to-month tenants years after the Lease has expired with the options just waiting to be exercised. And, any ambiguities found in the Lease must be construed against the drafter, the defendants herein, who in their guise of Sponsor partnership, controlled the actions of the plaintiff with regard to the Lease negotiations.

That the Renewal Options might vest prior to the expiration of the Lease is a position that has been rejected by the courts, since the interest must vest, if at all, no later than 21 years after one or more lives in being. In fact, the original Lease term has expired, defendants are presently month-to-month tenants, and the month-to-month tenancy has already extended beyond the 21-year period.

Further, that defendants invested thousands of dollars to improve the Premises is irrelevant where the Lease violates the Rule Against Perpetuities, and is void *ab initio*. In any event, there have been no substantial improvements to the Premises, and the subtenants have made minor modifications to the space to conform to their needs. The areas of the commercial space that are the responsibility of the defendants remain in a constant state of disrepair.

In addition, the absence of any limitation on defendants' right to exercise the Renewal Options serves no other purpose than to prohibit the free alienation and transfer of property, with no real obligations, or incentives, with regard to improvement to the leasehold. Plaintiff is prevented from ever obtaining a reasonable price for the space in accordance with the terms of the sweetheart lease, and is constantly battling defendants for the most *de minimus* compliance with the Lease. Therefore, the Renewal Options also violate the law against unreasonable restraint on the alienation of property.

Furthermore, the statute of limitations defense is inapplicable where the agreement is illegal and void *ab initio*. An agreement void at its inception does not become valid by the mere passage of time.

Thus, plaintiff is entitled to summary judgment declaring the Renewal Options void as a matter of law.

Defendants' Reply

Defendants point out that plaintiff's action was commenced only weeks after the repeal of the "80/20" rule, which now no longer restricts a cooperative's gross income from sources other than their tenant-shareholders to 19.5%. Since the Lease potentially has another 99 years remaining, plaintiff now seeks to declare the Lease void, to get "every penny possible from" its

commercial space.

In any event, the Option Clause requires plaintiff to issue the 7-months notice prior to the expiration of any term of the Lease. Once this notice is served, defendants may serve the six-month notice of their intent to exercise the Renewal Option for another term of 10 years or for the balance of years of all remaining options. To avoid an unintended termination of the Lease due to inattention, the savings provision was inserted to provide that the Lease would remain in effect notwithstanding any failure to serve such notices. The Lease does not “terminate” if plaintiff fails to issue the 7-months notice and defendants fail to issue the 6-month notice; in such instance, the Lease “term” ceases from being one of years and becomes one of month-to-month. If the “term” expires, the new month-to-month term springs into being under the Lease and the provisions and Renewal Options continue with the Lease.

Even if the Rule Against Perpetuities applies to the Renewal Options, the savings clause and presumption of validity found in EPTL § 9-1.3 serve to preserve the leasehold and the Renewal Options.

Nor do the Renewal Options constitute an unreasonable restraint on the alienation of property. The Lease does not expire when one of its terms of years might. There are no inhibitions preventing plaintiff from transferring the fee interest; defendants’ interest is in the leasehold. Similarly, defendants’ leasehold remains vested throughout so it cannot be said to inhibit plaintiff from leasing to another. Further, should the Lease term expire, plaintiff can issue the 60-day notice, thereby requiring defendants to either exercise the Renewal Options to commence a new term of years, or not, and face a termination of the month-to-month tenancy.

Thus, plaintiff’s motion for summary judgment should be denied.

Plaintiff's Reply

Defendants' arguments regarding the "80/20" rule are irrelevant to the issue presented. The change in law in no way diminishes the fact that the Renewal Options are void. In any event, plaintiff's action was underway before it had any knowledge of the change in the tax law. Since there is a possibility of the Renewal Options being exercised more than 21 years after the execution of the Lease, they are void.

The perpetuities period actually passed before it came to light that no notice was sent. The original Lease term expired in 1997 and defendants have remained on the premises as month-to-month tenants as of that date. Yet, notwithstanding said expiration, the defendants, upon proper notice from plaintiff, could now, eleven years after the Lease expired, and 25 years after the Lease was executed, still elect all nine additional 10-year terms, and thereby remain as tenants for another 90 years. As such, the Renewal Options are null and void.

The "term of a lease" and the "terms of a lease" have distinctly different meanings. Whereas the month-to-month tenancy may be subject to the same terms and covenants of the original Lease, the month-to-month tenancy is a new term for a new period. Since the Lease explicitly reserves the right for the lessee to exercise the Renewal Options after the initial Lease term expires, they are not appurtenant to the Lease.

Further, the Lease was unilaterally drafted to do exactly what the statute prohibits. And, for the Renewal Options to vest now, they would clearly do so outside the permitted period.

As the individuals who were members of both the Sponsor and Blecker Leasing executed all of the requisite documents, the Deed and the Lease, on behalf of both the lessee and the lessor, the obvious intent of the Renewal Options was to block the plaintiff, the grantee of the

Building, from, in perpetuity, being able to freely dispose of its leasehold interests in the commercial portions of the Building, and conversely, secure said interests in perpetuity for the benefit of Bleecker Leasing.

Analysis

As an initial matter, the six-year statute of limitations does not apply to plaintiff's action to declare the Renewal Options void *ab initio* (see *Riverside Syndicate, Inc. v Munroe*, 10 NY3d 18, [2008] [holding that the six-year statute of limitations for contract actions did not apply to landlord's action to declare a contract void at its inception]; *Symphony Space, Inc. v Pergola Properties, Inc.*, 88 NY2d at 484] [under EPTL 9-1.1(b), an interest is void from the outset if it *may vest too remotely*]). Therefore, the branch of defendants' motion to dismiss the complaint on the ground of untimeliness is denied.

As to the defendants' remaining contentions, a party seeking summary judgment must demonstrate that it is entitled to judgment as a matter of law by setting forth evidence to eliminate any material issues of fact (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). The opposing party must then demonstrate the existence of a factual issue requiring a trial of the action in order to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]).

"In New York the disposition of property by a landowner is limited by three rules. 'The first two, known as the Rule Against Perpetuities, are found in subdivisions (a) and (b) of EPTL 9-1.1 The third rule regulating dispositions is established by common law and invalidates conveyances which impose unreasonable restraints on alienation'" (*Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 161 [1986]; *Omath Holding Co., Inc. v City of New York*,

149 AD2d 179, 545 NYS2d 557 [1989]).

The Rule Against Perpetuities (or “the Rule”) as codified in EPTL § 9-1.1 provides that

(a)(1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. . . .

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. . . .

EPTL § 9-1.1 is predicated upon the public policy of the State to ensure “the productive use and development of property by simplifying ownership, facilitating the exchange thereof, and freeing property from unknown impediments to alienability” (*Symphony Space, Inc. v Pergola Properties*, 88 NY2d 466, 475 [1996] citing *Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d at 161]). The rules embodied in EPTL § 9-1.1 constitute nonwaivable, legal prohibitions (*Symphony Space, Inc. v Pergola Properties*, 88 NY2d at 476).

EPTL § 9-1.1(a) sets forth the suspension of alienation rule and deems void any estate in which the conveying instrument suspends the absolute power of alienation for longer than lives in being at the creation of the estate plus 21 years (*Symphony Space, Inc. v Pergola Properties*, 88 NY2d 466 [1996]).

EPTL § 9-1.1(b)’s prohibition against remote vesting deems an interest invalid “unless it must vest, if at all, not later than twenty-one years after one or more lives in being.” That is, an interest is void from the outset if it may vest too remotely (*Symphony Space, Inc. v Pergola Properties, supra*). The purpose of this Rule is to “prevent unreasonable restrictions on the alienation of property” (*Deer Cross Shopping LLC v Stop & Shop Supermarket Co.*, 2 Misc 3d

401, 773 NYS2d 211 [Supreme Court, New York County 2003] [interpreting EPTL §9-1.1(b)]. The Court of Appeals has described subdivision (b) as “a rigid formula that invalidates any interest that may not vest within the prescribed time period” and has “capricious consequences” (*Symphony Space, Inc. v Pergola Properties, supra, citing Wildenstein & Co. v Wallis, 79 NY2d 641, 647-48*]).

Unlike the EPTL 9.1-1, which “is measured exclusively by the passage of time,” New York’s common-law rule against unreasonable restraints on alienation requires a case-by-case analysis that measures the reasonableness of the restraint based on its duration, purpose and, where applicable, the designated method for fixing the purchase price (*Symphony Space, Inc. v Pergola Properties, 88 NY2d 466, citing Wildenstein & Co. v Wallis, 79 NY2d at 641, 648, 595 NE2d 828 [1992]* and *Metropolitan Transp. Auth. v Bruken Realty Corp., 67 NY2d 156, at 161-162, supra*).

Both the statutory and common law rules serve the same general purpose by limiting the power of an owner to create uncertain future estates (*Metropolitan Transp. Auth. v Bruken Realty Corp., 67 NY2d 156, supra*): the statutory rule, indirectly, by limiting the time when future interests must vest; the common law rule, directly by forbidding owners to impose conditions on conveyances which block the grantee from freely disposing of the property (*Id.*).

Where, as here, the parties to a transaction are corporations and no measuring lives are stated in the instruments, the perpetuities period is simply 21 years (*Symphony Space v Pergola Properties, supra; see, Metropolitan Transp. Auth. v Bruken Realty Corp., 67 NY2d at 161, 501 NYS2d 306*).

Symphony Space, Inc. v Pergola Properties, Inc. (88 NY2d 466, 646 NYS2d 641 [1996]),

on which plaintiff heavily relies, involved an option to *purchase* certain real property. In *Symphony*, an agreement between two corporations gave one of the corporations a repurchase option that could be exercised more than 21 years after the agreement was consummated. After concluding that EPTL § 9-1.1(b) applied to commercial options, the Court acknowledged that an option to purchase that “originates in one of the lease provisions, is not exercisable after lease expiration, and is incapable of separation from the lease, known as options “appendant” or “appurtenant” to leases, “is valid even though the holder's interest may vest beyond the perpetuities period” and is not contemplated by EPTL §9-1.1(b). However, the purchase option at issue did *not* fall within this exempted category of options appurtenant to leases. The option “was not contained in the lease itself, but in a separate agreement,” in that the option was in no way “affected or impaired by . . . performance or nonperformance, actual or asserted, of any obligation to be performed under the Lease or any other agreement.” Also, the duration of the option exceeded the term of the lease, in that “defendants could compel” the sale of the property “*even after they have ceased possession as lessee.*” The court also refused to adopt the “wait-and-see” approach proposed by the defendant, stating that under EPTL § 9-1.1(b), an interest is “void from the outset if it *may* vest too remotely” (emphasis supplied).

Deer Cross Shopping LLC v Stop & Shop Supermarket Co. (2 Misc 3d 401, 773 NYS2d 211 [Supreme Court, New York County 2003] [Cahn, J.]), on the other hand, involved *an option to renew a lease*. The lease contained an original lease term for 25 years, with three successive options to extend the term of the lease for three separate 10-year terms. Under the lease, the tenant could give notice of its intention to exercise an option at any time 11 months prior to the commencement of the extension period. According to the Court, the “failure to give the above

notice did not automatically terminate the tenant's right to exercise the option.” Rather, the owner was required to give the tenant notice that the tenant had not timely exercised the option. Upon receipt of such notice, the tenant had an additional 60 days to exercise the option. If the landlord failed to provide such notice on or before a date which was 60 days after the owner's notice was given, the term of the lease was automatically extended past the expiration date to a date 60 days after the date that such notice was given by the landlord. This was subject to the right of the tenant to terminate the lease on 60 days' notice to the landlord.

The court noted that the Lease contained the term “Expiration Date” and concluded that such term did not mean the date the lease expired, but the date when the first 25-year period of occupancy ends.

The court rejected plaintiff's argument that the options could be exercised after the lease expired and therefore did not fall under the exception set forth in *Symphony Space*. Instead, the lease renewal options were appurtenant to the lease and thus, were not barred by the Rule Against Perpetuities. The Court stated that the lease provided that if the landlord failed to provide timely notice of the tenant's failure to exercise a renewal option, then the term of the lease was extended past the “expiration date” to a date which was 60 days after the date that such notice was eventually given by the landlord. Therefore, since the lease term was extended until such time as the option was exercised or the lease was terminated, the option had to be exercised within the term of the lease. “In other words, the lease remained in full force and effect and did not end during the extended period.”

Upon the plain reading of the Option Clause here, under the first paragraph of the Option

Clause, the tenant must exercise its option to renew by giving the lessor, plaintiff herein, six months written notice prior to the expiration of the Lease term; otherwise the failure to exercise the Option to Renew results in the expiration of the Option Clause, and the Renewal Options are no longer available to the defendants.

However, under the last paragraph of the Option Clause, notwithstanding the above, where (1) the tenant failed to timely exercise the Renewal Options and (2) the lessor/plaintiff failed to provide 7-months notice of the tenant's Renewal Options, defendants' option to renew is preserved until 60 days after plaintiff provides the 6-month notice. According to the Option Clause, each Renewal Option remains in effect, and defendants may exercise their Renewal Options up to 60 days after plaintiff provides notice of defendants' right to renew, even where the "term of said Lease may have expired." In the event "the term" "expired," the tenant is permitted to remain in the Premises as a month-to-month tenant until the lessor/plaintiff provides the tenant with the 7-months notice. In other words, once either party fails to serve its respective notice, the term of the Lease expires, and the term of the Lease, once for 14 years, now becomes one for month-to-month.

While the "term" of the Lease may expire upon the failure of either party to issue their respective notices, the Lease itself does not. Like the renewal clause in *Deer Park*, the Lease, by its own terms, permits the defendants to remain in possession of the Premises as month-to-month tenants, and as such, the Lease does not terminate during this extended period. The reference in the Option Clause to "expired" "term" refers to the date when the 14-year or renewal term of the Lease ends. This interpretation is evidenced by the language: "provided Lessor has not notified Lessee of the existence of such option within seven (7) calendar months prior to the date of

which *each term ends*,” and “If the *term* shall have expired, Lessee shall remain in possession as a Month-to-month tenant, as well as the references in the Lease to “term” as the “initial term” or “renewal term” (emphasis added). While it has been held that an option to renew a lease is invalid where it can be exercised after the initial lease term had expired (*Warren Street Associates v City Hall Tower Corp.*, 202 AD2d 200, 608 NYS2d 429 [1st Dept 1994]; *Soldiers’, Sailors’, Marines’ and Airmen’s Club, Inc. v The Carlton Regency Corp.*, 2008 NY Slip Op 30152 [Supreme Court New York County 2008] [finding that where mortgage lender may exercise renewal option in a lease between tenant and lessor by assuming lease after the 50-year lease term expired, such option violated the exception to the rule against perpetuities]), the Lease herein does *not* expire upon plaintiff’s failure to give 7-months’ notice of the Renewal Options (and upon defendants’ failure to timely exercise the option).

Contrary to plaintiff’s contention, the Renewal Options herein fall within the exception outlined in *Symphony Space* and qualify as options appurtenant to the Lease in that (1) they originate in the subject Lease, (2) can only be exercised during the period when the Lease is in effect, and thus, may not be exercisable after the expiration of the Lease, and (3) are incapable of separation from the Lease. Thus, the Option Clause is not subject to EPTL 9-1.1(b) (*see Buffalo Seminary v McCarthy*, 86 AD2d 435, 441, n 5; *Deer Cross Shopping LLC v Stop & Shop Supermarket Co.*, 2 Misc 3d 401, *supra*). Accordingly, the branch of defendants’ motion to dismiss plaintiff’s claim that the Option Clause violates the Rule Against Perpetuities is granted, and said claim is dismissed.

Nor do the Renewal Options violate the common law rule against unreasonable restraints against alienation.

At the outset, the rule “does not condemn restrictions on transfer . . . but condemns only the “effective *prohibition* against transferability itself” (*Metropolitan Transp. Authority v Bruken Realty Corp.*, 67 NY2d 156, *supra*) and here, there is no prohibition against plaintiff transferring its fee interest in the Building. Further, since defendants’ interest in the leasehold remains vested throughout the term of the Lease, plaintiff has no right to lease the Premises to another while the Lease remains in effect. Finally, plaintiff may issue the 7-months notice at any time during the month-to-month tenancy, thereby compelling defendants to either serve an intent to exercise the Renewal Options so as to extend the term of the Lease for a new term of years, or forfeit their right to do so, and subject themselves to plaintiff’s termination of the month-to-month tenancy (*see Deer Cross Shopping LLC v Stop & Shop Supermarket Co.*, 2 Misc 3d at 405 [after finding that the renewal clause did not violate EPTL 9-1.1(b), noting that the tenant could not, by delaying in exercising the option, convert the lease into one of indefinite duration which might result in an unreasonable restriction on the alienation of the property, where lease provided that if the tenant delayed in exercising the option, the landlord could send a notice to that effect which would compel the tenant to exercise the option within 60 days or risk termination of the lease]). Therefore, it cannot be said that defendants, as tenants, could delay in exercising the Renewal Options and convert the Lease into one of indefinite duration, resulting in an unreasonable restriction on the alienation of property.

Additionally, as the Renewal Options are only exercisable during the pendency of the Lease, it cannot be said that they may be exercised indefinitely after the Lease’s expiration so as to constitute an unreasonable restraint upon the alienation of property (*cf. Inwood Park Apartments, Inc. v Coinmach Industries Co.*, 22 AD3d 350, 801 NYS2d 893 [1st Dept 2005]).

In light of the above, the branch of defendants' motion for summary dismissal of plaintiff's claim that the Option Clause violates EPTL 9-1.1 (first and second cause of action) and New York's common law rule against the unreasonable restraint upon the alienation of property (third cause of action), is granted, and said claims are dismissed.

Further, given that plaintiff's fourth cause of action seeking a declaration that Bleeker Jones Leasing Company, a/k/a Bleeker Jones Leasing Company and their subtenants are month-to-month tenants is "[p]redicated upon the fact that the Renewal Options contained in the Lease were *void ab initio*," the fourth cause of action is likewise dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed; and it is further

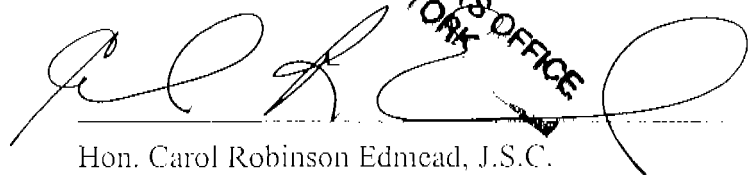
ORDERED that plaintiff's cross-motion for summary judgment on its complaint is denied; and it is further

ORDERED defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Date: August 4, 2008


Hon. Carol Robinson Edmead, J.S.C.

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COUNTY CLERK'S OFFICE
NEW YORK